IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
DECEMBER 2, 2008 Session

JACKIE WAYNE BALLARD v. SONYA RENEE BALLARD

Direct Appeal from the Circuit Court for Davidson County
No. 06D-2793 Carol Soloman, Judge

No. M2008-00713-COA-R3-CV - Filed January 21, 2009

In this appeal, we are asked to determine whether the trial court erred in awarding Wife $5,015.00 as her share of the appreciation of the marital home. We are also asked to determine whether the trial court erred in awarding Husband $18,780.00 for attorney's fees when he made no claim for alimony, and failed to show both his need for such an award and Wife's ability to pay. We reverse the circuit court's award of $5,015.00 to Wife, and find that Wife is entitled to no appreciation of the marital home as she made no "substantial contribution to its preservation and appreciation" such that the appreciation became marital property. We affirm the circuit court's award of $18,780.00 to Husband for attorney's fees.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Reversed in Part

ALAN E. HIGHERS, P.J.,W.S., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

Grant C. Glassford, Brentwood, TN, for Appellant

Thomas F. Bloom, Nashville, TN; Larry H. Hagar, Madison, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

In 1991, Jackie Wayne Ballard, Jr. ("Husband") purchased, and titled in his own name, a home at 668 Lake Terrace Drive in Nashville for approximately $81,000.[1] In May of 1993, the first mortgage on the home was paid in full and a second mortgage obtained. Also in 1993, Husband began dating Sonya Renee Ballard ("Wife"). Thereafter, in either late 1993 or 1994, Wife and her daughter from a previous marriage, Whitney, moved in to Husband's home. Wife's only assets brought into the relationship were a vehicle, clothes for both her and Whitney, and a chair or two. Husband and Wife were married on November 4, 1995.

After their marriage, Husband and Wife continued to maintain separate checking accounts. Throughout their approximately twelve year marriage, Husband paid the mortgage note, the utilities, the property taxes, and the homeowner's insurance from his personal checking account into which he deposited his pay checks from his employment with the Ajax Turner Company. The parties had two children together: Bailee, born July 11, 1996, and Brycen, born March 16, 1998. Just prior to the birth of their son, Wife left her job at ASCAP, where she had worked for five years, in order to stay home with the parties' children. Wife stayed home for approximately three to four years, but at some point began working various part-time jobs. In addition to her income from these part-time jobs, Wife received $146 per week in child support from Whitney's father. Although Wife acknowledges that she paid nothing toward the mortgage, the utilities, or the homeowner's insurance, she claims she used her "little bit of income" towards buying groceries, clothing, and other items the children needed for school and their activities. Additionally she claims that after giving Whitney a portion of her child support payment, Wife spent "the rest on things for the house."

According to Husband, two fires occurred at the home during the parties' marriage. The first, in the late 1990s, Husband claims, was caused when Whitney lit a candle too close to a towel rack, igniting the rack and causing $50,000 in damage, which was apparently paid by the homeowner's insurance. Thereafter, Husband purportedly "asked [Wife and Whitney] not to bring candles in the house anymore."

The second fire, the "big fire," occurred in December of 1997. According to Husband, when he returned home from work he found a fire built in the fireplace. Upon noticing that the fire had caused the television to become hot, Husband warned Wife that she was "going to burn the house down." Husband then left to run an errand, but shortly thereafter received a telephone call from Wife notifying him that the home was on fire. Husband maintains that the second fire destroyed forty percent of the home.

Following the second fire, Husband filed a claim with his insurance company, which paid out the policy's limits– apparently $105,000. After making such payment, Husband's insurer

[1] Wife's name has never been listed on the title to the property at 668 Lake Terrace Drive.

cancelled his "regular" coverage, forcing Husband to obtain coverage from a substandard company at an increased rate. The parties used the insurance proceeds to rebuild the home, making improvements such as turning the half garage into a den, enlarging the kitchen, building a shop, and altering the home's floor plan. Additionally, the parties spent approximately $40,000 refurnishing the home's contents and applied approximately $18,000 to $20,000 toward the mortgage's principal balance.

On September 29, 2006, Husband filed a Complaint for Divorce against Wife citing both irreconcilable differences and various fault-based grounds. On December 7, 2006, Wife filed an Answer and Counter-Claim for Divorce denying Husband's fault grounds and alleging both irreconcilable differences and inappropriate marital conduct by Husband.

A trial was held over two days: December 6, 2007, and January 29, 2008. After the first day of trial, the trial court entered an Order ("Order One") declaring the parties divorced by stipulation and dividing the parties' personal property. The remaining issues were reserved until the trial's completion.

Following the conclusion of the trial on January 29, 2008, the court entered a second Order on March 4, 2008 ("Order Two"). In this Order, the trial court stated

> The Court . . . finds that the home located at 668 Lake Terrace Drive, Nashville, Tennessee was separate property that was owned prior to the marriage and bases its decision on Cohen v. Cohen. The Court finds that the difference in the appreciation of the home from the date of the marriage to the date of divorce is Fifty Thousand ($50,000.00) Dollars. The Court specifically makes findings of fact that the Wife has dissipated funds during the marriage. The Court further finds that the Wife illegally and fraudulently forged Mr. Ballard's signature on his checking account, which amounts to [$7,235.70] and in addition, Ms. Ballard stole Mr. Ballard's credit card and ran the credit card up to an amount of [$4,500.00] and the Husband made repairs of [$6,500.00] after the Wife left the residence. The Court finds that the Wife is liable for one-half (1/2) of the repairs to the house of [$3,250.00] and any award to her is reduced by the aforementioned amounts.
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> The Court further finds, to balance the Wife's equity in the Husband's real property, the Wife is awarded forty (40%) of the appreciation of the property, or [$20,000], less [$7,235.70] for forged checks, [$4,500.00] for the credit card bill of the Husband and

[$3,250.00] for repairs to the property, awarding her a judgment of [$5,015.00] for her interest in the Husband's separate real property.

Also on March 4, 2008, the trial court entered an Order ("Order Three") awarding Husband $18,780.00 for attorney's fees and $1,118.50 for discretionary costs for a total judgment of $19,898.50. This award was made after Husband filed a Motion for Attorney Fees and Discretionary Costs, on February 15, 2008, which included a notice that a hearing concerning such motion would be held on February 22, 2008. Wife did not respond to Husband's motion, nor did she or her counsel appear at the February 22, 2008 hearing.

Wife now appeals to this court as to Order Two and Order Three.

II. ISSUES PRESENTED

Appellant has timely filed her notice of appeal and presents the following issues for review, restated as follows:

1. Whether the trial court erred in calculating the amount of equity in the marital residence;
2. Whether the trial court erred in deducting from Wife's award, the unauthorized credit card charges made prior to the marriage as well as the forged checks; and
3. Whether the trial court erred in awarding Husband his attorney's fees, when he made no claim for alimony and showed neither his need for such nor Wife's ability to pay.

Additionally, Appellee presents the following issue for review:

4. Whether the trial court erred in awarding Wife any of the appreciation of the marital home.

For the following reasons, we reverse the circuit court's award of $5,015.00 to Wife and find that she was entitled to no appreciation of the marital home; however, we affirm the circuit court's award to Husband of $18,780.00 for attorney's fees.

III. STANDARD OF REVIEW

We must give great weight to the trial court's decisions in dividing marital assets, and "'we are disinclined to disturb the trial court's decision unless the distribution lacks proper evidentiary support or results in some error of law or misapplication of statutory requirements and procedures.'" ***Keyt v. Keyt***, 244 S.W.3d 321, 327 (Tenn. 2007) (quoting *Herrera v. Herrera*, 944 S.W.2d 379, 389 (Tenn. Ct. App. 1996)). "Questions regarding the classification of property as either marital or separate, as opposed to questions involving the appropriateness of the division of the marital estate, are inherently factual." ***Owens v. Owens***, 241 S.W.3d 478, 485 (Tenn. Ct. App. 2007) (citing *Current v. Current*, No. M2004-02678-COA-R3-CV, 2006 WL 656791, at *1 (Tenn. Ct. App. Mar. 15, 2006); *Bilyeu v. Bilyeu*, 196 S.W.3d 131, 135 (Tenn. Ct. App. 2005), *perm. app. denied* (Tenn. June 12, 2006); 19 W. Walton Garrett, *Tennessee Practice: Tennessee Divorce, Alimony and Child*

Custody § 15:3, at 324 (rev. ed. 2004). Therefore, we review the trial court's classification of property with a presumption of correctness and will not overturn those factual findings unless the evidence preponderates against them. *See* ***Owens***, 241 S.W.3d at 485; Tenn. R. App. P. 13(d) (2006). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. ***Watson v. Watson***, 196 S.W.3d 695, 701 (Tenn. Ct. App. 2005) (citing *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999)). We review a trial court's conclusions of law under a *de novo* standard upon the record with no presumption of correctness. ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993) (citing *Estate of Adkins v. White Consol. Indus., Inc.*, 788 S.W.2d 815, 817 (Tenn. Ct. App. 1989)).

"Because trial courts are in a far better position than this Court to observe the demeanor of the witnesses, the weight, faith, and credit to be given witnesses' testimony lies in the first instance with the trial court." ***Keyt***, 244 S.W.3d at 327 (citing *Roberts v. Roberts*, 827 S.W.2d 788, 795 (Tenn. Ct. App. 1991)). "Consequently, where issues of credibility and weight of testimony are involved, this Court will accord considerable deference to the trial court's factual findings." ***Id.*** (citing *In re M.L.P.*, 228 S.W.3d 139, 143 (Tenn. Ct. App. 2007)).

IV. DISCUSSION

A. Classification of the Appreciation in Value of Marital Residence

Tennessee is a "dual property" state, as our divorce statutes distinguish between marital and separate property. ***See Batson v. Batson***, 769 S.W.2d 849, 856 (Tenn. Ct. App. 1988). The first step a trial court must take in dividing a marital estate is to identify all of the parties' property interests. ***Owens***, 241 S.W.3d at 485 (citing 19 W. Walton Garrett, *Tennessee Practice: Tennessee Divorce, Alimony and Child Custody* § 15:2, at 321 (rev. ed. 2004)). Next, the trial court must classify the identified property as either marital or separate. ***Id.*** (citing *Flannary v. Flannary*, 121 S.W.3d 647, 650 (Tenn. 2003); *Conley v. Conley*, 181 S.W.3d 692, 700 (Tenn. Ct. App. 2005); *Anderton v. Anderton*, 988 S.W.2d 675, 679 (Tenn. Ct. App. 1998)). "This classification is an important threshold matter because courts do not have the authority to make a distribution of separate property." ***Summer v. Summer***, No. E2007-01003-COA-R3-CV, 2008 WL 990454, at *2 (Tenn. Ct. App. Apr. 10, 2008), *perm. app. denied* (Tenn. Oct. 27, 2008) (citing *Keyt*, 244 S.W.2d at 328; *Flannary*, 121 S.W.3d at 650).

Tennessee Code Annotated section 36-4-121 governs the classification of property as marital or separate, and defines "marital property" to include:

> (1)(A) . . . all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce . . . .
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> (B) "Marital property" includes income from, and any increase in value during the marriage of, property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation . . . .
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> (D) . . . "substantial contribution" may include, but not be limited to, the direct or indirect contribution of a spouse as homemaker, wage earner, parent or family financial manager, together with such other factors as the court having jurisdiction thereof may determine.

Tennessee Code Annotated section 36-4-121 further defines "separate property" as

> (2)(A) All real and personal property owned by a spouse before marriage . . . ;
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> (B) Property acquired in exchange for property acquired before the marriage;
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> (C) Income from and appreciation of property owned by a spouse before marriage except when characterized as marital property under subdivision (b)(1)[.]

Thus, our statutes provide that "[a]n increase in value during the marriage of property determined to be separate property will be classified as marital property if 'each party substantially contributed to its preservation and appreciation.'" ***Summer***, 2008 WL 990454, at *5 (citing Tenn. Code Ann. § 36-4-121(b)(1)(B); *Keyt*, 244 S.W.3d at 328-29). However, our Supreme Court clearly expressed in *Harrison v. Harrison*, 912 S.W.2d 124, 127 (Tenn. 1995), that "[t]he statute does not permit the conclusion that *any* increase in value during marriage constitutes marital property. The increase in value constitutes marital property only when the spouse has substantially contributed to its preservation and appreciation." To qualify as "substantial," a contribution must satisfy two requirements. ***Summer***, 2008 WL 990454, at *5 (citing *Keyt*, 244 S.W.3d at 328-39). "First, the

contributions must be 'real and significant.'" ***Id.*** (quoting *Keyt*, 244 S.W.3d at 328-29). "Second, there must be some link between the spouses' contributions and the appreciation in the value of the separate property." ***Id.*** (quoting *Keyt*, 244 S.W.3d at 328-29).

In Order Two the trial court stated that it found the home "was separate property that was owned prior to the marriage." From the bench, following trial, the trial court explained:

> I can say by clear and convincing evidence that [Husband is] the only one that did anything to appreciate the value of the house. He paid out of his separate account the house payment, the taxes, the insurance, the repairs – not counting any utilities or anything like that. . . . [Husband is] the only one that made the property appreciate or the mortgage go down.
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> [She] dissipated the assets of the house itself by being slothly like, and keeping pigs in there. And the man who reconditioned it along with [Husband] said it stank and was soaked of urine. They had to pull up the carpet and flooring and soak the concrete in – I think he said Clorox – I can't remember what he did to get the urine smell out of there. Because [Wife] was so filthy with her care of the animals. But you think that appreciated the house? I don't think so.
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> But she did nothing to appreciate the value of that house. And I can tell you that it would be only a gift if I gave her anything for that house. She was a homemaker of sorts. And [Husband] said it was always dirty, and it was never refuted, there was dirty laundry pil[]ed up, that she didn't keep a clean house, that he was always coming home from work and having to do the laundry or cleaning up. So her value as a homemaker and a parent is marginal.
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> . . . It's a gift to give her 40 percent.

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> . . . I've got a hard working person here that tried to save and put everything into the property, and built it up. And I have somebody who spent all of her time destroying it.
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> But I find that she did everything she could to dissipate the assets of the family – everything she possibly could.

Despite these findings, the trial court awarded Wife $20,000–forty percent of the home's $50,000 appreciation from the time of the parties' marriage to divorce– "to balance the Wife's equity in the Husband's real property." However, this award was reduced by $7,235.70 for forged checks, $4,500.00 for unauthorized credit card usage, and $3,250.00 for repairs to the home. Thus, the total judgment awarded to Wife was $5,015.00.

On appeal, Wife contends that the trial court erred in calculating the appreciation in the marital residence. To calculate the appreciation of the marital home, the trial court compared the fair market value of the home at the parties' marriage with the fair market value of the home at the parties' divorce, a difference of $50,000. However, Wife contends that rather than looking at the fair market value of the home, the court should have considered the equity built during the marriage, which she claims is $95,892.

We need not consider whether the trial court erred in considering the home's fair market value rather than the equity built during the marriage, as we find that Wife is entitled to *no* appreciation in the marital home as she did not "substantially contribute[] to its preservation and appreciation." *See* Tenn. Code Ann. § 36-4-121(b)(1)(D) (2005). Tennessee Code Annotated section 36-4-121(b)(1)(D) expressly states that "direct or indirect contribution[s] of a spouse as homemaker" may be considered "substantial contributions," which will convert separate property into marital property. However, contributions as a homemaker must nonetheless be "real and significant." Not just *any* contribution will do.

From Order Two it is unclear whether the trial court's award to Wife was based on its classifying the appreciation in the home as marital property or whether it simply felt compelled to award Wife a portion of Husband's separate property. However, we find that either rationale resulted in error. Because the record reveals no "substantial contribution" on behalf of Wife, the evidence preponderates against a conclusion that the home's appreciation was marital property. Likewise, if the court did not consider the appreciation marital property, it was without authority to award any portion of such to Wife.

The trial court found, and we agree, that the marital home, itself, was Husband's separate property. Thus, as the nonowner spouse, Wife was required to prove some "substantial contribution" by her, such that the home's appreciation became marital property. ***See Cutsinger v. Cutsinger***, 917 S.W.2d 238, 241 (Tenn. Ct. App. 1995) (citation omitted). When asked what contributions she made to the home, Wife answered that she cooked, cleaned, and bought groceries and accessories–things to decorate like lamps and pictures–for the home. However, Husband testified that Wife did not keep the house very clean, and she allowed laundry to "stack[] up five f[ee]t high beside the washing machine." Robert Fenton, a carpet installer, also testified that the lower level of the home was "real messy [and] had animal feces and urine soaked through the carpet," causing the home to smell "like cats and dogs." Furthermore, Husband testified that he did "a big majority of the cooking[,]" and that he, too, bought groceries while Wife "[o]n occasion would bring home groceries." The trial court found Husband to be a credible witness, but found Wife not credible.

We find the record devoid of any significant contributions by Wife, as homemaker or otherwise, to the marital residence's appreciation. Instead, the record reveals significant evidence to the contrary. We find Wife's only "contributions" were contributing to two fires at the home, causing approximately $200,000 in damage, and contributing to the home's filthiness by bringing two pot-bellied pigs into the home.

Because Wife made no substantial contributions to the appreciation of the marital home, to support a finding that the appreciation became marital property, the trial court was without authority to award Wife a percentage of the home's appreciation. ***See Cutsinger***, 917 S.W.2d at 241 ("If the nonowner spouse cannot prove that a piece of property is marital property, the trial court has no authority to make an equitable division of the property.") (citation omitted). Thus, based on our de novo review of the record, we find that the evidence preponderates against the trial court's award of $5,015.00 to Wife as her share of the marital home's appreciation.

B. Award of Husband's Attorney's Fees

On appeal, Wife also contends that the trial court erred in awarding Husband $18,780.00 in attorney's fees.[2] She claims that an award of attorney fees constitutes alimony in solido, and points out that Husband made no claim for alimony. Furthermore, she contends that such an award was inappropriate as Husband failed to demonstrate his need for, as well as Wife's ability to pay.

An award of attorney fees in a divorce case is "within the sound discretion of the trial court, and unless the evidence preponderates against the award, it will not be disturbed on appeal."

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[2] In her brief, Wife states that "[t]he trial court erred by awarding Appellee attorney fees and discretionary costs[.]" However, Wife's brief presents no argument concerning discretionary costs, and at oral argument Wife's counsel asked only that the award of attorney's fees be reversed. Thus, we will not consider whether the award of discretionary costs was in error.

Kincaid v. Kincaid, 912 S.W.2d 140, 144 (Tenn. Ct. App. 1995) (citing *Lyon v. Lyon*, 765 S.W.2d 759, 762-63 (Tenn. Ct. App. 1988)). We need not consider the substantive correctness of the trial court's award as we find Tennessee Rule of Appellate Procedure 36 precludes the relief requested.

Husband requested that Wife pay his attorney's fees both in his Complaint for Divorce and during closing arguments on January 29, 2008. Thereafter, on February 15, 2008, Husband submitted a Motion for Attorney Fees and Discretionary Costs supported by an attached Affidavit. The Motion contained a notice that the motion would be heard on February 22, 2008 at 9:00 AM. However, Wife did not file a written response to Husband's Motion, nor did she appear at the February 22, 2008 hearing. Pursuant to Davidson County Local Rule 26.04(d)'s requirement,[3] the trial court granted Husband's motion.

Tennessee Rule of Appellate Procedure 36 provides that "[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." We find Wife's failure to oppose an award of attorney's fees either through a written response or an appearance at the hearing, constituted such a "failure to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." **Tenn. R. App. P. 36 (2008)**. Therefore, Wife is entitled to no relief from the judgment.

V. CONCLUSION

For the aforementioned reasons, we reverse the circuit court's award to Wife of $5,015.00 as we find the appreciation in the marital property is the separate property of Husband. We affirm the circuit court's award of $18,780.00 to Husband for attorney's fees. All remaining issues are pretermitted. Costs of this appeal are taxed to Appellant, Sonya Renee Ballard, and her surety, for which execution may issue if necessary.

ALAN E. HIGHERS, P.J., W.S.

[3] Davidson County Local Rule of Court 26.04(d), concerning motions in civil cases, provides

> If the motion is opposed, a written response to the motion must be filed and personally served on all parties. The response shall state with particularity the grounds for opposition to the motion, supported by legal authority, if applicable. If no response is filed, the motion shall be granted with the exception of certain proceedings in Probate.